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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-933

THADDEUS M. OHRYNOWICZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Government has failed to show that Petitioner has committed a federal crime. No attempt whatsoever is made to support the ruling of the Court of Appeals. Petitioner was charged with causing the mails to be used in furtherance of a scheme to defraud. The testimony pre-

sented by the Government established that the bank personnel involved in the alleged check kiting scheme did not know that the mails would be used in the process of clearing the checks deposited by Petitioner. If the personnel responsible for the clearing of the checks did not know that the U.S. mails were to be involved, how can it be said that Petitioner is charged with knowledge that use of the mails would follow in the ordinary course of business, or could be reasonably foreseen? Indeed, the Court of Appeals recognized that "It was not the normal practice of these banks to utilize the mails in the bank collection process." . . .

The Court of Appeals completely ignores the ruling of this Court in *Kann v. United States*, 323 U.S. 88 (1944) and *Parr v. United States*, 363 U.S. 370 (1960), discussed in the Petition for Certiorari. The reliance of the Court of Appeals' opinion upon *United States v. Sampson*, 371 U.S. 75 (1965) is obviously misplaced. In that case, the mails had been used by the defendant "for the purpose of lulling [the victim] by assurances that the promised services would be performed," even after the defendant has obtained the money from them. There was no such use of the mails here. Accidentally and incidentally and through no action or intent of petitioner, the mails were used to clear two checks which had been deposited by Petitioner. This clearing of checks was not part of any scheme alleged by the Government, and by its terms could not be used to further the scheme as alleged in the indictment.

The mail fraud statute contains clear and specific limitations. These limitations must not be ignored whenever

it suits the government to do so. To repeat what this Court has said in *Parr v. United States*, 363 U.S. 370, 389, 80 S. Ct. 1171, 1183 (1960):

> ". . . as its terms and purpose make clear, the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The State of Illinois elected to dismiss the charges placed against Petitioner arising out of the series of events involved herein. The Government has failed to prove violation of any federal statute. The Government has further failed to find any defense for the obviously erroneous decision of the Court of Appeals.

Finally, the Government has noted, in passing, that the Petition for Certiorari was not filed within 30 days after the final decision of the Court of Appeals. This Court has held on numerous occasions that the provisions of Rule 22(2), Supreme Court Rules, is not jurisdictional. *Durham v. United States*, 401 U.S. 481, 91 S. Ct. 858, 859 (1971). Such rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64, 90 S. Ct. 1555, 1559 (1970); *Taglianetti v. United States*, 394 U.S. 316, 89 S. Ct. 1099, 1100 (1969). This is obviously such a case.

It is respectfully submitted that this Court grant certiorari, and reverse the judgment of conviction based upon the papers now before it. Alternatively, full con-

sideration should be given to the serious errors of su
stance and procedure committed in this cause and the
should be further briefing and argument.

Respectfully submitted,

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